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No. 90-1581

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1990

ARTHUR S. LANGENDERFER, INC., *et al.*,
Petitioners,

vs.

S. E. JOHNSON COMPANY, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENTS' MISSTATEMENT OF THE CASE

Respondents ("defendants" or "Johnson") misstate the case. They persist in rearguing that Petitioners' ("plaintiffs") case is nothing more than a complaint about defendants' "low bidding." Defendants refuse to recognize that the trial court (affirmed by the Sixth Circuit) cured any risk of that.[1] The jury verdicts were expressly based on the finding that defendants' anticompetitive conduct arose, *not from low bidding,* but from "The [thirteen] acquisitions [which] were all made to exclude &/or injure competition, and increase Johnson's power which he succeeded in doing." (Jury Ans. to Itg. No. 10; A81),[2] The Sixth Circuit properly held this was a jury question on the first *Langenderfer I* appeal. 729 F.2d at 1058-59. Defendants omit to mention that as a result of those acquisitions, defendants controlled 75% to 85% of the Ohio Turnpike paving market and between 40% and 80% of the OTC/ODOT paving market over thirteen years in Northwestern Ohio (1972-85). They also controlled the "inputs" (stone, sand and asphalt) that went into those paving jobs. They also neglect to mention that the Sixth Circuit found on both appeals:

> Substantial evidence indicated that Kirkby, both individually and as chief officer of Johnson, intended to eliminate competition and dominate the market *** [and that] *Johnson's acquisitions significantly*

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[1] The trial court expressly charged the jury: "I instruct you that defendants' profitable bidding does not constitute anticompetitive conduct as a matter of law, and you may not base a verdict on the fact that defendants were able to bid lower than competitors and still make a profit." (Court's Chg. at JA 218, 3815). The Sixth Circuit in *Langenderfer II* held that this instruction cured improper inferences that might otherwise have been drawn by the jurors *as to all plaintiffs* about low bidding (917 F.2d at 1440; A53). The jury is presumed to have followed the court's instructions. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 604 (1985).

[2] References to "A" are to the Appendix to the Petition. References to "JA" are to the Joint Appendix in the Court of Appeals. Respondents' Opposition is cited as "Opp." Emphasis is that of undersigned counsel.

> *reduced competition and increased market concentration thereby creating a monopolistic market structure.*

729 F.2d at 1054; 917 F.2d at 1417-18; A68. *See* Petition (pp. 2-12) for a full Statement of the Case.

REASONS FOR GRANTING THE WRIT

I. Neither The Seventh Amendment Nor *Matsushita* Permits A Court Of Appeals To Substitute Its View Of Economic Reality For The Jury's Findings.

The very arguments advanced in Respondents' Opposition establish with compelling force why it is necessary for the Court to scrutinize closely the appellate conduct at issue here. Plaintiffs are not complaining about appellate review of sufficiency of the evidence, but about the improper reexamination of the jury's findings contrary to the Seventh Amendment.

The same Court of Appeals (the same two judges sitting) has now twice reversed unanimous jury verdicts in this 15-year old monopoly case and overruled two different, experienced trial judges who permitted the verdicts to stand. It has purported to do so on the grounds of insufficient evidence. It has disregarded the major findings of a carefully instructed jury on answers to special interrogatories. It has paid lip service to traditional standards of review and then ignored them in making its own findings.[3] It has reversed on issues not even raised below and on findings *the jury did not make.* It has taken the place of the jury in redetermining damages which were never challenged below and never

[3] We agree (Opp. 5) that the appellate court invoked all the talismanic standards of review, but it then proceeded to ignore them in disregarding the jury's explicit findings and making its own *de novo* findings. The Sixth Circuit's 71-page opinion is replete on its face with the weighing and sifting of evidence, credibility judgments, disparagement of plaintiffs' evidence, an argumentative tone, blunderbuss conclusions drawn as to each of the unsuccessful plaintiffs and finally, the grudging affirmance after evisceration of Langenderfer's damage award because the jury did not understand "economic reality."

appealed. In reducing Langenderfer's damages by two-thirds, it has gratuitously stated that "some of the dollar figures offered by plaintiffs and their experts simply *fail to reflect economic reality* and we shall make adjustment accordingly. . . ." (A62). This is not simply "recalculation" or "correcting arithmetical errors"—this is *sua sponte* determination of damages *de novo*. This is taking the "economic plausibility" of *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) far beyond its intended application. If the Sixth Circuit approach is correct, every court of appeals now has license to disagree with juries and experts on economic theories of damages and apply its own;[4] the Seventh Amendment, and the right to a fair hearing in the appellate courts, will be swiftly replaced by judicial theorizing as to what is "plausible" or "economic reality" without regard to the constitutional right to trial by jury or the integrity of the appellate process.

II. The Seventh Amendment Precluded *Sua Sponte* Review Of Langenderfer Damages Or NOAP's Standing. The Issues Were Never Raised Or Preserved At Trial Or On Appeal.

A. Defendants concede they waived the issue of NOAP's standing; judgment for NOAP must be reinstated.

Defendants waived any issue as to NOAP's standing. In contrast, they raised MacRitchie Materials' standing every step of the way (*See* Issues Presented V,

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[4] For example, the Sixth Circuit arbitrarily excluded (without citation) Langenderfer's first method of proving damages for losses on jobs it won. This was contrary to every scrap of economic and accounting testimony on the subject (JA 2588-96; 2676-78; 2867-69). Even defendants' experts agreed (JA 2283-93; 3672-74). Net operating losses have always been recoverable. "[P]laintiffs may recover the net losses that were actually incurred in addition to the profits they would have made." *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 559 F. Supp. 922, 930 (E.D. Pa.), *aff'd* 752 F.2d 802, 814 (3d Cir. 1984).

A128). Whether standing is a legal or factual issue makes no difference here. It was waived as long ago as 1980 in *Langenderfer I. Defendants silently concede they never preserved it below or raised it on appeal.* They cite to *nothing* in the record (*See* Opp. at 11). Instead, defendants argue by reference to *dictum* in *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). But appellate courts simply do not create issues that have been knowingly waived. *E.g., Brown v. Marshall*, 704 F.2d 333, 334 (6th Cir. 1983) (*per curiam*). Even defendants do not have the nerve to argue that "injustice" might result from the court not taking up an issue they did not think important enough to raise. The Sixth Circuit admitted that "the [standing] issues are extremely close as to NOAP's antitrust claims of indirect injury" (A50). NOAP's standing and its right to recover damages were subsumed in the jury verdicts. Under the Seventh Amendment, that result must be respected. There is no justification, legal or otherwise, for the Sixth Circuit's gratuitous reach to strike down NOAP's standing. NOAP's judgment should be reinstated along with Langenderfer's.

B. Defendants concede they never raised the excessiveness of Langenderfer's damage verdict as grounds for a new trial.

The excessiveness of a verdict must be raised on a motion for a new trial with specificity. If not raised, it is gone. The Sixth Circuit, out of deference to the Seventh Amendment, has held that "failure to include an excessive damages issue in a motion for a new trial or otherwise present it to the trial court precludes our review." *Young v. Langley*, 793 F.2d 792, 794-95 (6th Cir.), *cert. denied*, 479 U.S. 950 (1986). Specific grounds not set forth in a motion for new trial cannot be considered by the Court of Appeals. *Turner v. Ohman House Corp.*, 376 F.2d 347, 349-50 (6th Cir. 1967); *Haley v. Wyrick*, 740 F.2d 12, 13-14 (8th Cir. 1984). The Sixth Circuit failed to follow its own rules.

Defendants, in effect, concede that they never challenged the excessiveness or amount of the Langenderfer *and NOAP* verdict. Their new trial papers and briefs contain no reference to the size of the verdict (*See* JA 285-86 attached). Defendants specified thirteen separate grounds for a new trial, but excessive damages was not one of them. Instead, defendants now argue that objections to the admission of certain damage evidence is the same as specifying excessiveness as grounds for a new trial (Opp. 11-13).[5] This is not the law. An asserted error in the admission of evidence is not the same as a claim that a verdict is excessive. Excessiveness was waived; the Sixth Circuit was without power to create grounds where they did not exist.

In order to avoid the consequences of their waiver, defendants now say that the Sixth Circuit reduced the damages by two-thirds, not because they were excessive, but because "the damages [were] based on erroneous damage evidence." (Opp. 12). If reviewing courts (trial and appellate) can *sua sponte* decide *ex post facto* that the damage evidence was "erroneous," there will be a lot of damage awards "adjusted accordingly." The Seventh Amendment will have become a futile protection against tampering with jury damage verdicts. Neither an appellate court nor a trial court can fix or redetermine damages in a jury case; their sole powers are to order a new trial or order a remittitur on condition that otherwise a new trial will be granted. *McKinnon v. City of Berwyn*, 750 F.2d at 1383, 1392 (7th Cir. 1984). Defendants' argument citing remittitur cases (Opp. 13) is inapposite. Remittitur procedure was not raised or followed here. The Court of Appeals action is solely limited to reviewing the trial court's action for abuse of discretion, not the jury verdict itself. *Young v. Langley*, 793 F.2d at 794-95.

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[5] Defendants argue (Opp. at 8) that "once the court concluded that the award for NOAP could not stand [on issues that were never raised or argued], it was duty bound to adjust the award" even though it was defendants' forms that lumped Langenderfer and NOAP together for damage purposes. Having invited the "error" now defendants use it as a bootstrap to uphold the appellate court's action.

III. The Court Of Appeals Did Not Review The Jury's Relevant Market Findings. It Created Its Own.

A. Defendants attempt to mislead this Court as they did the Court of Appeals on the relevant product market issues.

The Court of Appeals devoted eighteen pages (A29-39, 41-47) to its ruling that plaintiffs did not prove that defendants monopolized the *production* of all stone, sand and asphalt. *That was not even the issue.* Defendants mislead this Court when they say (Opp. at 16) that this was the "market definition presented by plaintiffs at trial . . . and the market definition given to the jury." *That was not plaintiffs' contention; that was not the market definition given the jury; and that was not the jury's finding.* The trial court instructed the jury on the parties' contentions (JA 205, 210-11):

> This is an antitrust case in which plaintiffs claim defendants have violated Section 2 of the Sherman Act by monopolizing and/or attempting to monopolize the bidding on and performance of Ohio Turnpike Commission and Ohio Department of Transportation contracts *and the supply of highway stone, sand and asphalt in such markets.*
>
> * * * * *
>
> *Plaintiffs contend* that there are four different product markets. They are . . . the production and supply of [1] stone . . . [2] sand . . . and [3] asphalt *used on ODOT and OTC paving contracts;* and [4] the bidding on and performance of paving contracts awarded to prime contractors by ODOT and OTC. In the alternative, plaintiffs contend that ODOT and OTC are also separate relevant markets for measuring competitive effects. *Defendants contend* that the appropriate relevant markets are: (1) *the production and supply of all limestone, not just limestone used on ODOT and OTC paving projects;* (2) *the production of all asphalt not just that used on ODOT and OTC paving projects;* (3) bidding on ODOT paving contracts; and (4) bidding on OTC paving contracts which is separate from ODOT bidding.

The jury answered "yes" to each of the relevant market interrogatories, finding in favor of plaintiffs' contentions that the defendants had monopolized stone, sand and asphalt "*used in* ODOT and/or OTC asphalt paving contracts," and the paving projects themselves (Ans. to Spec. Itgs. 1-5, 8-9; A75-80).

But the Court of Appeals inexplicably ignored those findings and drew its own *de novo* conclusion that plaintiffs had to prove *defendants'* contention, a contention the jury must be presumed to have rejected. Appellate courts are supposed to review the jury's findings and see if there is evidence to support them. They must defer to the jury's findings under the Seventh Amendment. The Court of Appeals ignored those findings, created its own relevant product market (all stone produced for whatever use) as a strawman and then blew it down with eighteen pages of immaterial discussion that defied the jury's findings. *That* is usurpation of the jury's fact finding mission, not simply weighing the sufficiency of the evidence as defendants argue. If courts of appeal can ignore jury findings and create their own relevant markets, then the Seventh Amendment is no longer a safeguard.

B. Defendants make no response to the geographic market issue.

If the defendants monopolized asphalt paving in the whole thirteen county area, did all plaintiffs (who competed within the thirteen counties) have to prove separately (as the Court of Appeals held) that defendants also monopolized *each county within the thirteen*? That is the legal issue (which Respondents studiously avoid) and it is an important one any time multiple plaintiffs sue the same monopoly. The Court of Appeals' ruling refuses to recognize the "economic reality" that the sum includes the whole of its parts as this Court held in *United States v. Grinnell*, 384 U.S. 563, 576 (1966) (Petition p. 21).

Defendants ignore *Grinnell* and the salient legal issue by resorting to evidentiary conclusions on which, of course, the jury and the trial judge found against them. The defendants' monopoly power in the thirteen counties obviously permeated the individual thirteen counties whether or not they physically had quarries, plants or monopoly market shares in each of the individual counties. Highways run between, among and through the counties; they are not locally contained. Furthermore, defendants leveraged their power from the whole to distort competition in each of the composite parts (Petition p. 22).

IV. Defendants Offer No Meaningful Response To Sader's Petition. The Court Preempted The Jury's Function In Reversing Sader's Award.

Defendants claim "Sader's claim was infirm for four reasons (A29)" (Opp. at 17). This is no response.[6] Defendants owned "an indispensable facility," the *only* quarry and asphalt plant for thirty miles roundtrip (*J.N.O.V.* Opn. A94-95). Defendants' refusal to deal (even for cash) to punish Sader was a jury issue. The Court of Appeals itself was "persuaded" that Sader's refusal to deal claim "had arguable merit" (A22). The only way the Court could have resolved the "arguable merit" issue against Sader was by weighing the evidence in contravention of the Seventh Amendment, which it did in reversing Sader's award.

V. Denying All Attorney's Fees And Costs For Nine Years To A Successful Antitrust Plaintiff Is Unconscionable On Its Face; It Is Not A Matter Of Discretion.

The Court of Appeals did not review the District Court's fee award for abuse of discretion (Opp. at 17) because the trial court did not exercise any discretion.

[6] Two of the four "reasons" were never raised, briefed or argued (Issues Presented, A127-28). This is further evidence of the court's overarching willingness to reach issues beyond the scope of review and make its own findings of fact contrary to the Seventh Amendment.

(Alternatively, it was a flagrant abuse.) The Court held *as a matter of law* (A106) that Langenderfer was not entitled to any fees or costs for the first nine years of this litigation because the claims in *Langenderfer I* and *Langenderfer II* were "distinct in all respects" (*Id.*). This is untenable on its face. As defendants admit even now: "The two cases which contained essentially the same allegations were consolidated for trial." (Opp. at 2). The Court's denial mocks the leading cases, including *Hensley v. Eckerhart,* 461 U.S. 424, 435 (1983), discussed in the Petition (pp. 26-27). Without reversal, such a result will plague attorney fee determinations for years to come.

VI. *Bonjorno* Does Not Control The Interest Decision Herein. The Decision Creates A Major Conflict In The Circuits.

Defendants argue that the denial of post-judgment interest is compelled by *Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 110 S. Ct. 1570 (1990). In *Bonjorno,* a concededly disputed damages amount was at the heart of the case and was not settled until the second judgment. In this case, by contrast, the *amount* of the Langenderfer and NOAP damages was not disputed. The damages ascertained by the first jury in 1980 were encompassed in the greater award returned by the second jury. Three Circuit Courts have recent decisions squarely contrary to the decision herein (Petition pp. 27-28). Where a second judgment on retrial includes the same damages as found by the original jury, interest runs from the original judgment on the lesser included amount (Petition pp. 27-28). This question will arise whenever larger judgments are awarded on retrial.

CONCLUSION

Plaintiff's Petition raises important questions involving application of the Seventh Amendment, appellate due process and major antitrust principles. The issues have broad impact and apply to almost any case

involving the limited scope of review and the power of an appellate court to overturn jury verdicts. Petitioners did not have a fair hearing in the appellate court—it is shocking that they never even had a chance to brief or argue the issues on which the court reversed because the issues were never presented.[7] They did not receive the minimal due process which they had a right to expect from an appellate court. The Court of Appeals "has so far departed from the accepted course of judicial proceedings . . . as to call for an exercise of the Court's power of supervision." (S.Ct. R.10.1(a)).

Obviously, this Court's decision in *Matsushita* has inspired some courts to substitute their own version of "economic reality" in summary judgment proceedings. Whatever the impact of *Matsushita* in the summary judgment process, it should not apply to full-blown jury trials as was done here. The tension persists between *Matsushita* and the Seventh Amendment (Petition p. 14) and is of consummate importance to the scope of appellate review following a jury trial. The Petition herein presents a rare opportunity to confront the issue on clear cut grounds. The Petition should be granted.

August 8, 1991

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[7] Plaintiffs' Petition for Rehearing and Rehearing *En Banc* raising the identical issues at stake here was denied without comment (A122-23).

[JA285] DEFENDANTS' MOTION FOR NEW TRIAL

Civil Action No. C76-425
No. C83-1144

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR S. LANGENDERFER, INC., *et al.*,
Plaintiffs,

v.

S. E. JOHNSON COMPANY, *et al.*,
Defendants.

JUDGE JOHN W. POTTER

Defendants move the Court, pursuant to Rule 59, Fed. R. Civ. P., to set aside the verdict of the jury and the judgment entered in this action on October 2, 1986, and to grant a new trial on the following grounds:

1) the verdict is contrary to the law;

2) the verdict is contrary to the clear weight of the evidence;

3) the evidence is insufficient to show that the acquisitions or covenants not to compete lessened competition or gave defendants monopoly power;

4) the evidence is insufficient to show any monopoly power;

5) the evidence is insufficient to show any predatory or anticompetitive conduct;

6) the evidence is insufficient to show antitrust injury;

7) the evidence is insufficient to establish relevant markets;

8) the Court erred in denying defendants' motion for directed verdict on the Section 2 claims;

[JA286] 9) the Court erred in admitting evidence that defendants bid lower than the statewide average and lower than competitors' cost plus overhead;

10) the Court erred in admitting evidence that combined the market share of France and defendants;

11) the Court erred in admitting evidence of damages from losses on jobs won;

12) the Court erred in admitting evidence of damages outside the relevant market; and

13) the Court erred in denying defendants' motion for separate trials.

The grounds in support of this Motion are set forth in the Memorandum in Support of Motion for Judgment *N.O.V.* or, in the Alternative, for New Trial filed

simultaneously herein. In addition, this Motion is based upon the record and proceedings in this action.

Respectfully submitted,

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